No. 15300

United States Court of Appeals

for the Ninth Circuit

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellant,

vs.

LAL SINGH,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 12-21-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

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For Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 35435

In the Matter of:

The Petition of LAL SINGH, for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable the Judges of the United States District Court for the Northern District of California, Southern Division.

The petition of Lal Singh, hereinafter referred to as petitioner, respectfully shows:

That the petitioner is unlawfull imprisoned, detained, and restricted of his liberty by Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, hereinafter referred to as respondent, in the said Northern District of California, Southern Division thereof; that said imprisonment, detention, confinement, and restraint is illegal, and that the Illegality thereof consists of this, to wit:

I.

Petitioner is a citizen of India and has resided in the United States for nearly 30 years, to wit, since the 10th day of January, 1927.

II.

Petitioner is detained by the respondent under an order that he be deported from the United States on the sole ground that he entered the United States without and immigrant visa on or about January 10, 1927, and respondent threatens to deport petitioner from the United States under said order.

III.

Prior to the issuance of said order, a hearing was held in the deportation proceedings in petitioner's case by Special Inquiry Officer H. H. Engelskirchen, and during said hearing petitioner filed an application for suspension of deportation.

IV.

There is annexed hereto, marked Exhibit A, and made a part hereof, a true copy of the decision and order of the said Special Inquiry Officer denying said application for suspension of deportation and directing that the petitioner be deported from the United States.

V.

Following the making of said order, petitioner filed an appeal from the order of the Special Inquiry Officer to the Board of Immigration Appeals at Washington, D. C., and there is annexed hereto, marked Exhibit B, and made a part hereof, a true copy of petitioner's appeal and of the decision of said Board of Immigration Appeals, dated December 2, 1955, directing that petitioner's appeal be dismissed.

VI.

Thereafter, petitioner filed a motion to reconsider with said Board of Immigration Appeals for the purpose of directing the attention of said Board to certain recent court decisions which petitioner believed would affect the decision entered in his case. On March 2, 1956, said Board of Immigration Appeals denied the motion to reconsider. A copy of petitioner's motion to reconsider and of the decision of the Board of Immigration Appeals denying said motion are annexed hereto, marked Exhibit C, and made a part hereof.

VII.

As will more fully appear from the annexed exhibits, the Board of Immigration Appeals has found that the petitioner's application for suspension of deportation must be considered under Section 244 of the Immigration and Nationality Act of 1952 (8 USC 1254) and that the petitioner had failed to meet the statutory requirements of said section, and the Board of Immigration Appeals denied the application for suspension of deportation.

VIII.

The decision of the Board of Immigration Appeals is clearly erroneous in that (1) the application for suspension of deportation should have been considered under the provisions of Section 19 of the Immigration Act of 1917, as amended (8 USC 155), instead of Section 244 of the Immigration and Nationality Act of 1952 (8 USC 1254), because the deportation proceeding was instituted prior to De-

cember 24, 1952, and the proceeding was saved by the provisions of the savings clause of the Immigration and Nationality Act of 1952 (Section 405) (8 USC 1101 footnote); (2) The petitioner meets the statutory requirements for suspension of deportation under both Section 19 of the Immigration Act of 1917 and under Section 244 of the Immigration and Nationality Act of 1952.

IX.

By reason of the premises, the petitioner has been denied a fair hearing and has been denied due process of law in that the Special Inquiry Officer and the Board of Immigration Appeals have denied his application for suspension of deportation and ordered him deported from the United States as the result of erroneous conclusions of law.

X.

No prior petition for a writ of habeas corpus has been made in regard to the detention and restraint complained of herein.

XI.

During the pendency of said deportation proceedings, petitioner has at all times been at large under bond in the sum of $1,000 and has at all times appeared before the immigration authorities whenever he has been called upon to do so.

Wherefore, petitioner prays that a writ of habeas corpus issue herein, directed to Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, commanding

him to have the body of said petitioner before this court at a time and place therein specified, to do and receive what shall then and there be considered by this court concerning said petitioner.

Dated: May 1, 1956.

/s/ MILTON T. SIMMONS,
Attorney for Petitioner.

Duly verified.

EXHIBIT A

United States Department of Justice
Immigration and Naturalization Service

(Copy)

Oct. 7, 1955.

File: A2 549 749—San Francisco

In Re: Lal Singh

In Deportation Proceedings

In Behalf of Respondent: Wayne Collins, Attorney at Law, Mills Tower Building, San Francisco, California.

Charges:

Warrant: Immigration Act of 1924—Immigrant—No visa.

Lodged: None.

Application: Suspension of deportation—Section 244(a)(1) of the Immigration and Nationality

Act—Exceptional and extremely unusual hardship.

Warrant of Arrest Served: September 22, 1950.

Discussion as to Deportability: This record relates to a 50-year-old divorced male alien, a native and citizen of India. The respondent testified he last entered the United States at Key West, Florida, about January 10, 1927, without inspection. He further testified at the time of his last entry it was his intention to seek employment and remain in the United States and that he was not in possession of a valid unexpired immigration visa. The charge contained in the warrant of arrest is sustained by the evidence of record.

Discussion as to Eligibility for Suspension of Deportation: The respondent testified that he was twice married in India: that his first wife died about 1920; and that his second wife divorced him about 1947 or 1948. He has no children by either marriage. He has no relatives in the United States. The respondent is a self-employed farmer whose net annual income apparently averages about $1000. His total assets consisting principally of his equity in fruit orchards amount to about $28,000. The record has established the respondent has been physically present in the United States for more than the past seven years. He is a quota immigrant without preference chargeable to the quota for India, which is heavily oversubscribed and he cannot readily obtain an immigrant visa if granted the privilege of voluntary departure and pre-examination.

A check of the appropriate local and federal records disclosed that the respondent was arrested for violation of the Passport Act of 1918 in 1925, and for drunk driving on three occasions between 1936 and 1941. He testified he was also arrested for drunk driving in 1954 and fined $158. Inquiry has disclosed that the alien has no connection with any subversive groups. Affidavits of witnesses attesting to the respondent's good moral character for more than the past seven years have been received in evidence. However, before reaching a conclusion as to whether or not the respondent has been a person of good moral character for at least seven years immediately preceding his application for suspension of deportation, it is necessary to examine his immigration record.

The respondent was apprehended by immigration authorities in the vicinity of San Diego, California, about July 29, 1925, for unlawfully entering the United States and was deported via San Francisco, California, on February 27, 1926. The record of the warrant hearing accorded him in that proceeding on August 3, 1925, shows that the respondent testified he entered the United States about July 27, 1925, near Calexico, California, without inspection, and that he had never previously lived in the United States. It is noted in recent years he has made several sworn statements to officers of the Immigration and Naturalization Service in which he claimed he first entered the United States in 1923; also that on occasion he refuted that claim and stated his origi-

nal entry occurred near Calexico, California, in 1925. The record also discloses that the respondent executed an application for registry of an alien under the Nationality Act of 1940, under oath, before an officer of the Immigration and Naturalization Service at Salinas, California, on November 29, 1949, in which he alleged that he arrived in the United States on January 10, 1923, at Key West, Florida; that since the date of that entry he had never been absent from the United States; and that he had never been deported. This application for registry was denied by the Assistant Commissioner of Immigration and Naturalization on May 22, 1950, on the grounds that the respondent (1) failed to establish he entered the United States prior to July 1, 1924; (2) he failed to establish continuous residence in the United States since prior to July 1, 1924; (3) he failed to establish good moral character; and (4) he is subject to deportation.

In this proceeding the respondent has admitted he falsely and deliberately made the foregoing allegations in his registry application in an effort to adjust his immigration status and remain in the United States. These false allegations were especially material in a registry proceeding and are tantamount to perjury. They also indicate a flagrant disregard of the solemnity of an oath and for the immigration laws. Moreover, the record would indicate the respondent's attempt to perpetrate a fraud in connection with his application for registry it is

not an isolated act of deceit in his dealings with the immigration authorities but rather a culmination of the deceit and evasion he practiced in matters relating to immigration.

It is therefore concluded that the respondent's false allegations in his registry application preclude a finding that he has been a person of good moral character for the past seven years. It is further concluded that the respondent has failed to establish he is statutorily eligible for suspension of deportation under the provisions of Section 244(a)(1) of the Immigration and Naturalization Act by reason of his failure to establish good moral character for the entire statutory period and his application for suspension of deportation is hereby denied. He is found to have been a person of good moral character for the past five years and is hereby granted the privilege of volutnary departure in lieu of deportation. The respondent stated in the event he is ordered deported, he desires to be sent to India. He can return to that country without fear of physical persecution.

Findings of Fact: Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of India;

(2) That the respondent last entered the United States at Key West, Florida, about January 10, 1927, without being inspected by immigration authorities;

(3) That the respondent at the time of his last entry into the United States intended to remain permanently in this country;

(4) That the respondent at the time of his last entry was not in possession of a valid unexpired immigration visa.

Conclusions of Law:

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Sections 13 and 14 of the Immigration Act of May 26, 1924, the respondent is subject to deportation on the ground that, at the time of entry into the United States, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

Order: It is ordered that the respondent be granted voluntary departure, without pre-examination, at his own expense in lieu of deportation with such period of time or authorized extensions thereof and under such conditions as the district director or officer in charge having administrative jurisdiction of the office in which the case is pending shall direct.

It Is Further Ordered that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the respondent deported from the United States in the manner

provided by law on the charge contained in the warrant of arrest.

/s/ H. H. ENGELSKIRCHEN,
Special Inquiry Officer.

rpl.

EXHIBIT B

Before the Board of Immigration Appeals
Washington. D. C.

In re: Lal Singh File A2 549 749

APPEAL FROM DECISION OF SPECIAL INQUIRY OFFICER

Statement of the Case

The appellant is a 50-year-old divorced male alien, a native and citizen of India. He last entered the United States at Key West, Florida, about January 10, 1927, without inspection, with the intention to seek employment and remain in the United States. He was not in possession of an immigration visa. It is conceded that the appellant is subject to deportation on the warrant charge.

He applied for suspension of deportation under the provisions of Section 244(a)(1). Application was made on the grounds that his deportation would result in extreme and exceptionally unusual hardship to himself and the fact that he had resided in

the United States continuously for nearly 30 years. The appellant is a self-employed farmer, with assets consisting of an equity in fruit orchards of approximately $28,000. The record will disclose that he was convicted under the Passport Act in 1925 and after such conviction was deported from the United States. He has no criminal record during the past seven years, except an arrest in 1954 which resulted in a fine for drunk driving.

The special inquiry officer states that inquiry disclosed that the appellant has no connection with any subversive groups. Affidavits of witnesses were offered at the hearing attesting to his good moral character for more than the past seven years. However, the special inquiry officer denied suspension of deportation on the ground that the appellant had failed to establish good moral character for the required seven-year period because of certain alleged false testimony in a registry application. The appellant admits that in a registry proceeding in 1949 he alleged under oath that he had entered the United States in 1923 and had not been absent from this country since that time, and also that he had never been deported from the United States. He testified that he had misrepresented these facts because he had been informed that persons who had resided in the United States continuously since 1924 could remain here, and "I wanted to stay so badly that I told a lie." On the basis of the admitted misrepresentation in 1949, the special inquiry officer finds that the appellant has not established good moral

character for the past seven years but that he has established good moral character for the past five years, and therefore denied the application for suspension of deportation and granted the appellant voluntary departure.

Argument

It is our contention that the special inquiry officer erred in holding that the appellant had failed to establish good moral character for the past seven years. As this Board has stated on numerous occasions, good moral character does not constitute moral excellence and a single fall from grace does not preclude a finding of good moral character. The Board has so held in numerous cases in which aliens have made false claims of United States citizenship under oath for the purpose of concealing illegal residence in the United States and avoiding deportation. Several of these decisions have been affirmed by the Attorney General. (In the Matter of B * * *, 1 I&N Dec. 611; In the Matter of B * * *, 2 I&N Dec. 492; In the Matter of V * * *, 2 I&N Dec. 606; In the Matter of K * * *, 3 I&N Dec. 180.)

The Board has also held that conviction of petty theft during the statutory period for which good moral character is required does not preclude a finding of good moral character. (In the Matter of T * * *, 2 I&N Dec. 614.)

We would particularly direct the attention of the Board to the Matter of U * * *, A-2741847 and A-2946078, decided March 4, 1947, and approved by

the Attorney General Mach 20, 1947, 2 I&N Dec. 830. The U * * * case is almost identical with the case of the appellant. The respondents in the U * * * case made false statements before an immigration officer to the effect that they had entered the United States prior to July 1, 1924, in order to obtain registry. They repeated the false statements on at least two other occasions. The Board stated in the U * * * case:

"Concededly, the false testimony given by the respondents with reference to their last entry into the United States amounted to perjury. The issue then is whether, because of perjury committed by them, they are estopped from showing good moral character for the required period of time so as to render them eligible for suspension of deportation. We have held that false testimony during deportation proceedings does not necessarily preclude a finding of good moral character (Matter of R * * *, 56124/971, Jan. 8, 1944). Good moral character should not be construed to mean moral excellence, nor is it destroyed by a single lapse. It is a concept of a person's natural worth derived from the sum-total of all his actions in the community (Matter of B * * *, 56130/885, Nov. 23, 1943; Matter of M * * *, 55964/176, Apr. 17, 1944; Matter of A * * *, 56052/439 (renumbered A-3595874), Dec. 28, 1943.) These views have also been expresed by the courts (In re Paoli, 49 F. Supp. 128). It has been said that depravity of character and violation of law are not necessarily wedded together (Petition of Schlau, 41

F. Supp. 161). The term "good moral character" is elusive and difficult of definition. On this theory it was said In re Hopp, 179 Fed. 561 and Turley v. United States, 31 F. (2d) 696, that it should not be construed to mean moral excellence or that it should be destroyed by a single lapse, but that it is something that measures up as good among the people of the community in which the party resides, that is, up to the standard of the average citizen; that in determining moral character the standard of the average American citizen as it exists today should be applied. Reputation which will pass muster with the average man is required; and that not every violation of law establishes bad moral character.

"* * *. Another peculiarity is that when the false statements were made, the apparent purpose was to secure registry, that is, legalization of their immigration status on the basis of an illegal entry prior to July 1, 1924; yet, there was available to them at that time suspension of deportation, the precise result which registry would have given them. The only ground of deportation is that they did not have immigration visas when they entered this country in 1925."

The appellant's sole motive in making false statements, as in the U * * * case, resulted from his eagerness to remain in the United States. The appellant could have applied for suspension of deportation, and the only ground of deportation in his case is the fact that he did not have an immigration

visa at the time of his entry. We submit that the U * * * case is ample authority for a finding that the appellant has been a person of good moral character for the statutory period, notwithstanding his misrepresentations in registry proceedings.

We are not unmindful of the fact that all of the cited decisions occurred prior to the enactment of the Immigration and Nationality Act of 1952, whereas in the appellant's case the proceedings were conducted under the provisions of the 1952 Act and application for suspension of deportation was made under Section 244(a)(1) of the Immigration and Nationality Act. However, we believe the standards of good moral character under the present Act are exactly the same as under prior legislation, except so far as they have been changed by Section 101(f) of the Immigration and Nationality Act. The only subdivision of Section 101(f) which might be held to have any bearing on this case would be subsection (6), which provides, "One who has given false testimony for the purpose of obtaining any benefits under this Act" shall not be regarded as a person of good moral character. We do not believe this subsection applies, however, because the false testimony in this case was given prior to the enactment of the 1952 Act for the sole purpose of gaining benefits under a prior immigration Act, i.e., registry. Consequently, the decision of this Board in the Matter of Z * * *, E-085577, decided November 12, 1953, 5 I&N Dec. 514, does not preclude a finding of good moral character in the case of the appellant.

As the Board stated in the Matter of K * * *, A-6092065, 3 I&N Dec. 69, in considering the case of an alien who was convicted of false claims of citizenship during the five-year period, "We note that misrepresentations set forth in the indictment were all part and parcel of respondent's attempt to hide his illegal entry in 1931. They were not motivated by any venal purposes." The Board also stated, "While we do not condone respondent's illegal actions in misrepresenting himself as a citizen, we nevertheless do not think that he is precluded from establishing his good moral character. Considering the record in its entirety, we think that he does have the requisite character to establish his eligibility for voluntary departure." The Board has also held that the same standard applies to both voluntary departure and suspension of deportation in determining what constitutes good moral character. (In the Matter of A * * *, 2 I&N Dec. 731.)

We note that the special inquiry officer states that the misrepresentations in the registry proceedings were not an isolated act, but the culmination of deceit and evasion practiced in matters relating to immigration. Such a statement is not established by the record. There were some discrepancies in his testimony at various times between 1949 and 1951. All of the statements made during that period were in relation to investigations following his application for registry and were apparently taken without benefit of an interpreter. The appellant does not admit having made any false statement in any of

these subsequent proceedings, and it may well be that the discrepancies contained therein are the result of misunderstanding rather than deliberate misrepresentations. It is noted that the last statement in 1951 is within the five-year period in which the special inquiry officer finds that the appellant has established good moral character. In any event, the testimony in all of these cases, if it were false, would not preclude a finding of good moral character because it was all in relation to the registry proceeding and would have constituted a single lapse of character, as in the cases of In the Matter of K * * *, 3 I&N Dec. 180, and In the Matter of U * * *, 2 I&N Dec. 830.

Conclusion

We respectfully submit that the appellant should be found to have established good moral character for the statutory period and that suspension of deportation should be granted for the following reasons:

1. The appellant has resided in the United States for nearly 30 years.

2. His deportation would involve extremely and exceptionally unusual hardship in that he has been absent from his native country ever since his youth, has resided in the United States during all of his adult life, and has acquired in the United States substantial agricultural holdings which he would be forced to sacrifice.

3. The appellant has during his stay in the United States become a substantial agriculturalist, he is highly recommended by neighbors and business associates in his community and has submitted ample evidence of good moral character for the past seven years.

4. The special inquiry officer's sole reason for denying suspension of deportation was the misrepresentations made by the appellant in 1949 in his effort to remain in the United States.

5. The finding in many cases by this Board that a single lapse does not preclude a finding of good moral character.

6. Considering the nature and the cause for the appellant's misrepresentations together with the other evidence of record, he has established that he is a person of good moral character.

Respectfully submitted,

....., MILTON T. SIMMONS, Attorney for Appellant.

November 8, 1955.

Before the Board of Immigration Appeals
Washington, D. C.

In re: Lal Singh File A2 549 749

Supplemental Appeal from Decision of
Special Inquiry Officer

Subsequent to the filing of the brief of appeal in this case, the appellant delivered to counsel a number of letters from civic officials and prominent business and professional men in the vicinity of his residence. These documents support our contention that the appellant is highly regarded and well recommended by the leaders of his community and that he has been a person of good moral character for more than the statutory period. It is requested that the following documents be considered together with our appeal brief dated November 8, 1955.

1. Statement of the Bank of America, Sutter County Branch, dated November 9, 1955.

2. Letter of Robert W. Steel, Attorney at Law, dated November 9, 1955.

3. Letter of Laurence H. Barnett, District Supervisor, Hunt Foods, Inc., dated November 8, 1955.

4. Letter of the Sutter County Treasurer and Tax Collector, dated November 8, 1955.

5. Letter of Richard R. Wilbur, Yuba City, California, dated November 8, 1955.

6. Letter of Sheriff, Sutter County, California, dated November 8, 1955.

7. Letter of Bachan S. Teja, Director, California Canning Peach Association, dated November 8, 1955.

Respectfully submitted,

....., MILTON T. SIMMONS, Attorney for Appellant.

November 10, 1955.

United States Department of Justice
Board of Immigration Appeals

(Copy)

Dec. 2, 1955.

File: A-2549749—San Francisco

In re: Lal Singh

In Deportation Proceedings

In Behalf of Respondent: Wayne Collins, Esquire, Mills Tower Building, San Francisco, California.

Charges:

Warrant: Immigration Act of 1924—Immigrant—No Visa

Lodged: None

Application: Suspension of deportation.

This is an appeal from an order entered by the special inquiry officer on October 7, 1955, finding

that the respondent is subject to deportation on the warrant charge, but granting to him the privilege of departing voluntarily from the United States upon compliance with certain conditions. The respondent's request that his deportation be suspended under the provisions of Section 244(a)(1) of the Immigration and Nationality Act was denied by the special inquiry officer on the basis that the respondent had not estabilshed statutory eligibility for consideration of this form of relief. Deportability on the warrant charge is conceded.

The factual situation has been set forth in the order appealed from and need not be fully reiterated here. Briefly, the record relates to a 50-year-old divorced male, a native and citizen of India, who testified that he last entered the United States through the port of Key West, Florida, in January, 1927. He further testifies that he affected this entry without inspection and that it was his intention at that time to remain permanently in the United States although he was not in possession of proper documents to so do.

We have given careful consideration to counsel's argument that the respondent has established that he has been a person of good moral character for the requisite period to be statutorily eligible for consideration for the relief sought.

The cases relied upon by counsel admittedly are cases which established precedences for the establishment of good moral character prior to the effec-

tive date of the Immigration and Nationality Act of 1952. That Act, however, by Section 101(f) sets forth specific classes of aliens who may not be found to be of good moral character. Counsel points out that the alien would not be precluded from establishing that he had been of good moral character by Subsection (6) of this Section inasmuch as his false testimony was not for the purpose of obtaining any benefits under this Act. In this, we concur. The concluding paragraph of Section 101(f) provides that the fact that an alien is not within any of the specific provided classes of aliens who may not be found of good moral character does not preclude a finding that for other reasons an alien may be found not to be of good moral character.

We concur fully in the reasons set forth by the special inquiry officer as his basis for holding that the respondent has not established that he was of good moral character and therefore, basically eligible for consideration for suspension of deportation. The evidence fully supports that the respondent admits making false statements under oath in connection with his application for registry on November 29, 1949. These statements considered with other factors relating to the respondent's status as an immigrant in the United States, we find, preclude a finding of good moral character. In view thereof, the appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman.

EXHIBIT C

(Copy)

Before the Board of Immigration Appeals
Washington, D. C.

In the Matter of

LAL SINGH, in deportation proceedings.

MOTION TO RECONSIDER

Introduction

This motion relates to a 50-year-old native and citizen of India whose application for suspension of deportation was denied by the special inquiry officer on October 7, 1955, on the ground that the respondent had failed to establish good moral character for the past seven years. In dismissing our appeal and affirming the order of the special inquiry officer, the Board of Immigration Appeals relied on the concluding paragraph of Section 101(f) as setting up a different standard of good moral character than that applied by the Board in deciding the same question under prior laws.

Subsequent to the decision of the Board of Immigration Appeals on December 2, 1955, our attention was directed to a decision of the United States District Court for the Northern District of California (Jose Esteban Romero-Garcia vs. Barber, No. 34639 (not reported)) relating to applications for suspension of deportation and the savings clause of the Immigration and Nationality Act. This decision,

considered together with other recent decisions of the Supreme Court and Court of Appeals, leads us to the conclusion that the respondent's application for suspension of deportation must be decided under the 1917 Act alone. The Board having relied on the provisions of the Immigration and Nationality Act in denying the application, we request the Board's reconsideration.

Statement of the Case

In the decision of December 2, 1955, the Board stated: "The cases relied upon by counsel admittedly are cases which established precedences for the establishment of good moral character prior to the effective date of the Immigration and Nationality Act of 1952. That Act, however, by Section 101(f), sets forth specific classes of aliens who may not be found to be of good moral character." The Board then cited the concluding paragraph of Section 101(f) and determined that the alien's false statements in an application for registry "considered with other factors relating to the respondent's status as an immigrant in the United States" precludes a finding of good moral character. We do not know what other factors relating to the respondent's status as an immigrant were considered by the Board. We do know, however, that one of the cases cited in our brief, and which the Board states established precedents for the establishment of good moral character under the prior law, is on all fours with the case of the respondent. Matter of U * * *, 2

I&N Dec. 830. We can only conclude, therefore, that if this case were to be decided under the laws in effect prior to December 24, 1952, suspension would have been granted.

In the Romero-Garcia case, supra, the alien was arrested in deportation proceedings on March 12, 1951. He applied for suspension of deportation on September 19, 1952. At his hearing on December 12, 1952, suspension of deportation was denied and he was ordered deported from the United States. No appeal was taken, but on March 13, 1953, a motion to reopen was made, which was denied on March 20, 1953. On appeal from the denial of the motion to reopen, the Board of Immigration Appeals granted voluntary departure, but held that Romero-Garcia was ineligible for suspension of deportation because his application for suspension had not been timely filed. Judge Goodman did not prepare a memorandum decision, but his judgment read as follows:

"1. That plaintiff's application was timely filed in accordance with the provisions of 19(c)(2) of the Immigration Act of 1917 (8 USC 155) prior to December 24, 1952, the effective date of the Immigration and Nationality Act of 1952 (PL 414, 66 Stat 163).

"2. That plaintiff's application for suspension of deportation is hereby remanded to defendant to rehear the same on the merits in accordance with applicable statutes and regulations."

This places an entirely new light upon the respondent's case as affected by the last sentence of Section 405(a) of the Immigration and Nationality Act, but one well supported by the prior decisions of the Supreme Court and the Court of Appeals. The respondent having been arrested on September 22, 1950, has had a deportation proceeding pending since that time. By the provisions of Section 405(a) of the Immigration and Nationality Act, nothing in the new Act will affect the validity of the respondent's deportation proceeding, but as to such proceeding the statutes repealed by the Immigration and Nationality Act are continued in force and effect. An application for suspension of deportation being a part of the deportation proceedings, it is our theory that the respondent's application for suspension of deportation should have ben decided pursuant to the provisions of the Immigration Act of 1917 and not under Section 245 of the Immigration and Nationality Act. We are aware of the last sentence of Section 405(a) of the Immigration and Nationality Act, but in our opinion that sentence does not conflict with the foregoing theory. We believe that the last sentence of the savings clause (Sec. 405(a)) has no bearing on applications for hearing, but merely provides that an application for suspension of deportation made by an alien who had no deportation proceeding pending may be considered as a "proceeding" if filed prior to the date of the enactment of the Immigration and Nationality Act (June 28, 1952).

Argument

I.

The 1917 Act Applies to the Respondent's Deportation Proceeding, Including His Application for Suspension of Deportation

This Board is familiar with the decision of the Supreme Court in United States vs. Menasche, 75 S. Ct. 513, and of the Court of Appeals in U. S. ex rel. Zacharias vs. Shaughnessy, 221 F. 2d 578, and Aure vs. United States, 225 F. 2d 88, interpreting the savings clause of the Immigration and Nationality Act (Section 405(a)). These decisions and certain District Court decisions have clearly established the broad scope of the savings clause.

The cited cases, together with prior decisions of the Board, show that as to a deportation proceeding instituted prior to the effective date of the Immigration and Nationality Act, the prior law continued in full force and effect. The special inquiry officer recognized this to be a fact when in the respondent's case at the conclusion of the hearing he stated:

> "You will be served with a signed copy of my decision and given a period of not to exceed ten business days in which to file an appeal. In the event the decision is adverse to this respondent, your appeal may be accompanied by a written argument or brief. Since the warrant of arrest in this case was served on September 22, 1950, there will be no fee for filing an appeal."

and thereafter in his decision found the alien to be deportable under the 1924 Act.

We believe that the Board will concede that as to the respondent's deportation proceeding the 1917 Act and the 1924 Act remain in full force and effect. However, both the special inquiry officer and this Board have considered the respondent's application for suspension of deportation under the provisions of the Immigration and Nationality Act rather than the 1917 Act, apparently because it was not filed until April 12, 1955.

We understand that the Immigration and Naturalization Service takes the view that the last sentence of the savings clause (Section 405(a)), which reads:

> "An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

requires that all applications for suspension of deportation filed after the date of enactment of the Immigration and Nationality Act must be considered under the provisions of that Act rather than the Act of 1917. We do not agree.

This Board is familiar with the practice which existed for a number of years prior to the enactment of the Immigration and Nationality Act whereby an alien who believed himself to be subject to deporta-

tion and eligible for suspension of deportation could voluntarily file an application for such relief. Thousands of such applications were filed and the Service was literally swamped with the processing of such cases. In some districts applications would lie dormant for as long as two or three years waiting to be processed. No deportation proceeding was instituted by the issuance of a warrant of arrest until such time as the case was finally processed and ready for a "short form" hearing. During this same period, however, aliens under deportation proceedings could, during the course of the regular deportation hearing, apply for suspension of deportation. Consequently there were two types of suspension of deportation cases before the Service. We do not believe that the last sentence of Section 405(a) was meant by Congress to be a restriction on the savings clause so far as applications for suspension of deportation filed in "saved" deportation proceedings are concerned. We believe that Congress meant the last sentence of Section 405(a) to be an extension of the scope of the savings clause, to include as "saved" proceedings those applications for suspension of deportation filed prior to the date of enactment in which no deportation proceeding had been instituted. It should be noted that the last sentence of the savings clause includes applications under Section 4 of the Displaced Persons Act as well as applications for suspension of deportation. There were thousands of unprocessed applications under the Displaced Persons Act during this same period.

Our view is supported by the Romero-Garcia case, supra. Judge Goodman's decision is quoted above. If Judge Goodman considered the last sentence as a restriction on filing of an application in a deportation proceeding after June 28, 1952, he would have dismissed the petition for a writ of habeas corpus, but he found that the application, filed September 19, 1952, was timely filed in accordance with Section 19(c)(2) of the Immigration Act of 1917, and remanded the case to the Immigration Service for a hearing on the application for suspension of deportation. We submit that the respondent's application for suspension of deportation should be considered under the provisions of Section 19(c)(2) of the Act of February 5, 1917, and not under the Immigration and Nationality Act.

II.

The Respondent Is Not Only Eligible for but Should Be Granted Suspension of Deportation under Sec. 19(c)(2) of the Act of 1917

As the Supreme Court in United States vs. Menasche, supra, stated:

> "The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, *manifests a well establish Congressional policy not to strip aliens of advantages gained under prior laws.* The consistent broadening of the savings provision, particularly in its general terminology, *intended to*

> *apply to matters both within and without the specific contemplation of Congress.*" (Italics added.)

and as Judge Goodman stated in Ex parte Robles-Rubio, 119 F.S. 610:

> "The savings clause in the 1952 Act is one of of unusual breadth as is appropriate to a statute which effects a complete revision of the immigration and naturalization laws of the nation. The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act would inevitably have unforeseen effects upon pre-existing statuses and conditions, and the Congressional desire to avoid such effects insofar as possible."

so we would say in this case that it was not the intent of Congress to strip this respondent of an advantage gained under the prior law. The respondent had a definite advantage under the prior law, in that Section 19(c)(2) requires that he prove only five years good moral character to be eligible for suspension of deportation, whereas under the Immigration and Nationality Act seven years of good moral character must be proved. This is particularly important because in granting the respondent voluntary departure the special inquiry officer and the Board found him to be a person of good moral character for the past five years, but suspension of deportation was denied on the ground that he failed to establish good moral character for the required

seven-year period. In view of this finding, we submit that he would be eligble for suspension of deportation under the provisions of Section 19(c)(2) of the Act of February 5, 1917.

We would again direct the attention of the Board to the cases cited in our appeal brief and which the Board agrees established precedents for the establishment of good moral character prior to the effective date of the Immigration and Nationality Act. In the Matter of U * * *, supra, the aliens involved gave false testimony in a registry proceeding that they had entered the United States prior to 1924. They repeated the false statements on at least two other occasions. The Board stated in the U * * * case:

"Concededly, the false testimony given by the respondents with reference to their last entry into the United States amounted to perjury. The issue then is whether, because of perjury committed by them, they are estopped from showing good moral character for the required period of time so as to render them eligible for suspension of deportation. We have held that false testimony during deportation proceedings does not necessarily preclude a finding of good moral character (Matter of R * * *, 56124/971, Jan. 8, 1944). Good moral character should not be construed to mean moral excellence, nor is it destroyed by a single lapse. It is a concept of a person's natural worth derived from the sum-total of all his actions in the community (Matter of M * * *, 55964/176, Apr. 17, 1944; Matter of A * * *,

B * * * 56130/885, Nov. 23, 1943; Matter of 56052/439 (renumbered A-3595874), Dec. 28, 1943.) These views have also been expressed by the courts (In re Paoli, 49 F. Supp. 128). It has been said that depravity of character and violation of law are not necessarily wedded together (Petition of Schlau, 41 F. Supp. 161). The term "good moral character" is elusive and difficult of definition. On this theory it was said In re Hopp, 179 Fed. 561 and Turley v. United States, 31 F. (2d) 696, that it should not be construed to mean moral excellence or that it should be destroyed by a single lapse, but that it is something that measures up as good among the people of the community in which the party resides, that is up to the standard of the average citizen; that in determining moral character the standard of the average American citizen as it exists today should be applied. Reputation which will pass muster with the average man is required; and that not every violation of law establishes bad moral character.

"* * *. Another peculiarity is that when the false statements were made, the apparent purpose was to secure registry, that is, legalization of their immigration status on the basis of an illegal entry prior to July 1, 1924; yet, there was available to them at that time suspension of deportation, the precise result which registry would have given them. The only ground of deportation is that they did not have immigration visas when they entered this country in 1925."

The fact that the perjury was committed during the five-year statutory period in the U * * * case did

not preclude a finding of good moral characetr by this Board.

The respondent's only admission of having testified falsely relates to the 1949 registry proceedings prior to the five-year period for which good moral character must be proven. We do not believe that the record supports the allegations by the special inquiry officer that the respondent has made several sworn statements claiming entry in 1923 and that his misrepresentation in the registry proceeding was the culmination of the deceit and evasion he practiced in matters relating to immigration. The record contains reference to two statements by the alien in 1950 and 1951 (Exhibits 10 and 11), both of which were subsequent to the registry proceeding. There is no evidence whatever of any deceit or evasion prior to the 1949 misrepresentations in the registry proceeding. The subsequent statements in 1950 and 1951 were related to the registry application. Since there was no interpreter present during the 1950 and 1951 statements, it is doubtful whether the respondent and the officer understood each other and whether any misrepresentation occurred. In any event, his conduct was no different than that of the aliens in the U * * * case, supra, who made at least two subsequent statements regarding entry prior to 1924. The motive in both cases was the same—eagerness to remain in the United States.

We submit that the respondent has estabilshed eligibility for suspension of deportation under the

provisions of Section 19(c)(2) of the Immigration Act of 1917. The respondent has resided in the United States for nearly 30 years. He has submitted evidence during the deportation proceedings, and again with the appeal brief, establishing that he is highly recommended by his neighbors and business associates in the community. During these years in the United States he has acquired substantial agricultural holdings which he would be forced to sacrifice if he were ordered deported from the United States.

Conclusion

We respectfully submit that the Board reconsider its decision and that the respondent be granted suspension of deportation for the following reasons:

1. That the respondent's application for suspension of deportation is to be considered under the provisions of Section 19(c)(2) of the Immigration Act of 1917.

2. That the special inquiry officer and the Board have found that the respondent has been a person of good moral character for the period required under Section 19(c)(2).

3. That the respondent has resided in the United States for nearly 30 years.

4. That his deportation would involve extreme and exceptionally unusual hardship in that he has been absent from his native country ever since his youth, has resided in the United States during all of his adult life, and has acquired in the United States

substantial agricultural holdings which he would be forced to sacrifice.

Respectfully submitted,

.....

MILTON T. SIMONS,
Attorney for Respondent.

December 21, 1955.

(Copy)

U. S. Department of Justice
Board of Immigration Appeals
March 2, 1956.

File: A-2549749—San Francisco

In the Matter of

LAL SINGH in Deportation Proceedings

In Behalf of Respondent: Milton T. Simmons, Esquire, 220 Bush Street, San Francisco 4, California.

Deportable: Act of 1924—No immigrant visa.

This motion requests reconsideration of the decision of this Board of December 2, 1955, which denied an application for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act of 1952. Counsel contends that the special inquiry officer and this Board were in error

in considering the respondent's application for maximum relief under the provisions of Section 244(a)(1) of the Immigration and Nationality Act. It is argued that since the proceedings were instituted prior to the enactment of the Immigration and Nationality Act of 1952, such application should have been considered under the Immigration Act of February 5, 1917, as amended. The purpose of the motion is for the consideration now of respondent's application under Section 19(c) of the Act of February 5, 1917, as amended. Counsel admits that no formal application for suspension of deportation was filed by the respondent until April 12, 1955. Counsel has referred to certain judicial decisions to support his request for reconsideration. We have examined those decisions. Only two decisions appear relevant to the issue, namely, Romero-Garcia v. Barber (unreported); and Miyagi v. Brownell, 227 F. 2d 33 (CCA D.C. 10/13/55).

This respondent, a 50-year-old male alien, a native and citizen of India, last entered the United States about January 10, 1927. The warrant of arrest was served September 22, 1950. The initial hearing was accorded February 8, 1954, at the conclusion of which the alien applied for suspension of deportation. He was given the required form which he executed and filed in the resumed hearing on April 12, 1955. He had made no request for suspension of deportation during the life of the Immigration Act of Feb. 5, 1917, as amended.

The instant case is distinguishable from the case,

Jose Esteban Romero-Garcia v. Barber (unreported) in that Romero-Garcia filed an application for suspension of deportation in warrant proceedings on September 19, 1952. The court held that the term "enactment" as used in Section 405(a) Immigration and Nationality Act meant the effective date of the Act (12-24-1952) and not the date of its passage (6-27-1952).[1] In effect the Romero-Garcia decision holds that an application for suspension filed on September 19, 1952, which was prior to the effective date of the Immigration and Nationality Act on December 24, 1952, was timely filed within the provisions of Section 405(a) Immigration and Nationality Act.[2] In the instant case respondent did not file an application for suspension of deportation until April 12, 1955, which was after the effective date of the Immigration and Nationality Act.

The case, Miyagi v. Brownell, supra, is clearly distinguishable from the instant case, in that Mi-

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[1]In the case, In Re Raimondi, 126 F. Supp. 390, at page 393, the court referred to the unreported decision (Romero-Garcia v. Barber) of United States District Judge Louis E. Goodman (among other decisions), in reaching the conclusion that the term or phrase "date of enactment" used in the Immigration and Nationality Act, meant the date on which the Act took effect—December 24, 1952.

[2]Section 405(a) Immigration and Nationality Act insofar as vital here reads: * * *

An application for suspension of deportation under Sec. 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection. * * *

Dated: May 1, 1956.

/s/ O. D. HAMLIN,
United States District Judge.

[Endoresd]: Filed May 1, 1956.

United States District Court for the Northern District of California, Southern Division

MINUTE ORDER—MAY 9, 1956

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Wednesday, the 9th day of May, in the year of our Lord one thousand nine hundred and fifty-six.

Present: The Honorable O. D. Hamlin.

[Title of Cause.]

This matter came on for hearing this date on order to show cause. Ordered after hearing, return of the defendant filed, memorandum of defendant to be filed by May 10, 1956, and petitioner granted 5 days thereafter to file reply. Case continued to May 16, 1956, for submission.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

The respondent Bruce G. Barber, District Director, United States Immigration and Naturalization Service, San Francisco, California, by and through his undersigned attorneys, Lloyd M. Burke, United States Attorney for the Northern District of California, and William B. Spohn, Assistant United States Attorney, makes this return on the order of May 1, 1956, to show cause why a writ of habeas corpus should not be issued herein:

I.

The respondent admits that the petitioner Lal Singh is a citizen of India and asserts that any residence by the petitioner in the United States has been and is unlawful for the reason that the petitioner entered the United States without inspection in January, 1927, in violation of applicable law and regulations, in that he had previously been deported in February, 1926, for having unlawfully entered the United States in July, 1925.

II.

The respondent denies that the petitioner is presently detained by the respondent, but asserts that the petitioner was ordered to surrender for deportation on May 1, 1956, pursuant to formal demand dated April 20, 1956, and that the petitioner did surrender accordingly on May 1, 1956; that thereafter, upon the filing of the petition herein,

the petitioner was released under bond pending the disposition of said petition. The respondent further asserts that the warrant of deportation of the petitioner was based upon the conclusion reached after due hearing and review that at the time of the petitioner's last entry into the United States, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by the applicable law and regulations.

III.

The respondent admits that expulsion proceedings under a warrant of arrest previously issued were held February 8, 1954, and continued to April 12, 1955, when the petitioner submitted an application for suspension of deportation.

IV.

The respondent admits that the Exhibit "A" annexed to and made a part of the petition is a true copy of the decision and order of the special inquiry officer as alleged in the petition. The Court will note that said decision contains, on page 3, the findings of fact upon which the special inquiry officer concluded that the petitioner was subject to deportation, but ordered that the petitioner be granted voluntary departure in lieu of deportation. Also, that it was further ordered that if petitioner failed to take advantage of the privilege of voluntary departure, said order would be withdrawn and the petitioner would be deported on the charge contained in the warrant of arrest dated July 7, 1950—

namely, that "The Immigration Act of May 26, 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder."

V.

The respondent admits that the Exhibit "B" annexed to and made a part of the petition is a true copy of the petitioner's appeal dated November 8, 1955, from the order of the special inquiry officer dated October 7, 1955, and of the decision of the Board of Immigration Appeals dated December 2, 1955. The Court will note that in the first paragraph on page one of the petitioner's appeal, it was conceded that he is subject to deportation on the charge contained in the warrant of arrest as set forth in paragraph IV hereinabove.

VI.

The respondent admits that on December 21, 1955, the petitioner filed a motion with the Board of Immigration Appeals to reconsider its aforesaid decision of December 2, 1955, in which motion certain court decisions were cited in the petitioner's behalf. The respondent further admits that on March 2, 1956, the Board of Immigration Appeals, after fully considering the effect of said court decisions and their asserted applicability to the petitioner's status, denied the motion to reconsider. The respondent further admits that the copies of said motion and decision annexed to and made a part of

the petition as Exhibit "C" are true and correct copies.

VII.

The respondent admits that the Board of Immigration Appeals found in its aforesaid decision of March 2, 1956, that the petitioner's application for suspension of deportation must be considered under Section 244 of the Immigration and Nationality Act of 1952 (8 USC 1254), and that the petitioner failed to meet the requirements of said section. The respondent denies that in said decision the Board of Immigration Appeals denied the petitioner's application for suspension of deportation, but asserts that the Board therein denied the petitioner's motion to reconsider its order of December 2, 1955, as stated in paragraph VI hereinabove. The Court will note that in said order of December 2, 1955, the Board of Immigration Appeals concluded as follows:

"We concur fully in the reasons set forth by the special inquiry officer as his basis for holding that the respondent has not established that he was of good moral characted and therefore, basically eligible for consideration for suspension of deportation. The evidence fully supports that the respondent admits making false statements under oath in connection with his application for registry on November 29, 1949. These statements considered with other factors relating to the respondent's status as an immigrant in the United States, we find, preclude a

finding of good moral character. In view thereof, the appeal will be dismissed.

"Order: It is ordered that the appeal be and the same is hereby dismissed."

VIII.

The respondent denies that the decision of the Board of Immigration Appeals is erroneous for the reasons stated in paragraph VIII of the petition or for any other reasons. This denial applies to both the December 2, 1955, and March 2, 1956, decisions of the Board of Immigration Appeals, although neither is specified in the petition.

IX.

The respondent denies that the petitioner has been denied a fair hearing and denied due process of law for the reasons stated in paragraph IX of the petition or for any other reasons.

X.

The respondent has no knowledge or information of any prior petition for writ of habeas corpus concerning the detention and restraint complained of in the present petition.

XI.

The respondent admits that the petitioner has been at liberty under bond since the issuance of the warrant of arrest on July 7, 1950, as stated in paragraph IV hereinabove, and that since that date the petitioner has appeared before the Immigration authorities whenever so required.

Wherefore, the respondent prays that the petition for writ of habeas corpus be dismissed and the order so show cause discharged.

Dated: May 9, 1956.

LLOYD H. BURKE,
United States Attorney,

By /s/ WILLIAM B. SPOHN,
Assistant United States Attorney, Attorneys for Respondent.

[Endorsed]: Filed June 21, 1956.

[Title of District Court and Cause.]

ORDER

On March 15, 1956, the respondent ordered the deportation of the petitioner. The petitioner was permitted to depart voluntarily, but his application for suspension of deportation was denied. He filed this petition for habeas corpus, admitting he was deportable, but alleging that his application for suspension of deportation was erroneously denied.

The petitioner first entered this country in 1925. Under the name of Garma Singh he was convicted later in the same year of a vilation of the Passport Act of 1918. He was deported, but entered the country again in 1927 unlawfully and without any inspection. In 1935 he stated under oath to an examining officer of the Immigration and Naturalization Service that he had entered this country only

once. In May, 1938, a warrant of arrest pursuant to deportation proceedings against the petitioner was issued, but it was returned unserved. Thereafter, in 1949, he made an application for Registry of an Alien in which he stated he had entered this country only once, in 1923, and had never been deported. This application was denied when it was learned that he had been deported before. It was also found that he was not a person of good moral character because of his "repeated false statements concerning his arrest and deportation." Thereafter, in 1950, a warrant of arrest in a deportation proceeding was issued charging petitioner with being in this country in violation of the Immigration Act of 1924. The first matter relating to this 1950 warrant of arrest was a hearing before a Special Inquiry Officer on February 8, 1954. The petitioner made an application for Suspension under § 244 of the Immigration and Nationality Act of 1952, and a second hearing in the deportation proceedings was held on April 12, 1955. He admitted four arrests for drunken driving. The Special Inquiry Officer found that he was deportable and ordered his deportation; he also found that he was not of good moral and character for seven years before the application for suspension, and therefore denied the application. 8 U.S.C.A. § 1254(a)(1). But he did find that he was of good moral character for the last five years, and thus granted him the privilege of voluntary departure. 8 U.S.C.A. §§ 1254(e), 1101(f). Conceding that he was deportable, the petitioner appealed to the

Board of Immigration Appeals. The Board affirmed the order of the Officer and stated:

"We concur fully in the seasons set forth by the special inquiry officer as his basis for holding that the respondent has not established that he was of good moral character and therefore, basically ineligible for consideration for suspension of deportation. The evidence fully supports that the respondent admits making false statements under oath in connection with his application for registry on November 29, 1949. These statements considered with other factors relating to the respondent's status as an immigrant in the United States, we find, preclude a finding of good moral character. In view thereof, the appeal will be dismissed." Board of Immigration Appeals, A-2549749, Dec. 2, 1955.

Thereafter, the petitioner moved the Board to reconsider on the ground that his eligibility should be determined under the 1917 Act as amended, 8 U.S.C.A. (1946 Ed.) § 155(c). The Board denied the motion, saying:

"Accordingly, we hold that respondent's application for suspension of deportation made April 12, 1955, must be considered under current law. The requirements have not been met for relief under that provision of law." Board of Immigration Appeals, A-2549749, March 2, 1956.

Thus, it seems clear that the Board determined statutory eligibility for suspension of deportation of the petitioner solely under the 1952 Act, and refused to apply the provisions of the prior Act.

Counsel for the petitioner contends that by vitrtue of the Savings Clause in the 1952 Act, § 405(a), 8 U.S.C.A. § 1101, note, he is entitled to have his eligibility for suspension considered under the prior Act, and that the refusal of the Board to do so constitutes an error of law which requires the Court to grant this writ. In support of his contention, he cites: United States v. Menasche, 348 U.S. 528, Aure v. U. S., 9 Cir., 225 F. 2d 88, Zacharias v. Shaughnessy, 221 F. 2d 578, Ex Parte Robles-Rubio, 119 F. Supp. 610, Miyagi v. Brownell, D.C. Cir., 227 F. 2d 33, Romero-Garcia v. Barber, #34639, D.C. N.D. Cal.

In the Aure case, supra, this Circuit held that no affirmative action need be taken by one claiming the benefits of the savings clause in order to preserve those benefits under that clause, and the test was whether the benefit claimed was a substantive right or a mere procedural one. In the Zacharias case, supra, the Second Circuit held that in a deportation proceeding which began with a warrant of arrest served after 1952, eligibility for voluntary departure should be determined under the prior law, since the application for voluntary departure related back to an application for an immigrant visa filed by the petitioner's wife some three months before the effective date of the 1952 Act. In Miyagi, supra, the first hearing in Miyagi's deportation proceedings was held in 1945; in 1950 he moved to reconsider, and the warrant and order of deportation were set aside and the hearing reopened. In

1953, Miyagi applied for suspension of deportation and it was heard and denied under the 1952 Act. The District of Columbia Circuit held that he was entitled to have his application for suspension determined under the 1917 Act because the savings clause applied to the reopened proceedings. These cases establish that no affirmative action is needed to come within the savings clause and that eligibility for suspension of deportation is a matter which comes within the purview of the savings clause, and which is saved if something relating to the deportation proceeding occurred prior to 1952. In the case at bar, the only thing relating to this deportation proceeding that occurred prior to 1952 is the service of the warrant of arrest. In the Zacharias case, it was an application by the wife for an immigration visa. In the Miyagi case it was the warrant of arrest and a hearing. These cases indicate that a warrant of arrest prior to 1952 is sufficient to entitle the deportee to have his eligibility for suspension of deportation determined under the 1917 Act.

Solely because the Board apparently limited its consideration of eligibility to the provisions of the 1952 Act, it would appear that the petitioner is entitled to a new hearing in order that the Board may apply the standards of the 1917 Act in the consideration of his application for suspenesion of deportation. It must be pointed out, however, that even if it is determined that the petitioner is eligible for suspension of deportation, the grant of that suspension is a matter committed to the unfettered discre-

tion of the Attorney General, and the exercise of that discretion is not reviewable in the courts save for an abuse of that discretion. Jay v. Boyd, U. S. Supreme Court, June 11, 1956, Barreiro v. Brownell, 9 Cir., 215 F.2d 584, Melachrinos v. Brownell, D.C. Cir., 230 F.2d 42, Kaloudis v. Shaughnessy, 2 Cir., 180 F.2d 489. On the basis of the record before us, the Attorney General might very well conclude that suspension of deportation should be denied to the petitioner in light of his background and history.

For the foregoing reasons, the petitioner is permitted a new hearing on his application for suspension of deportation, in which his eligibility is to be determined under the 1917 Act. The writ of habeas corpus staying his deportation until that hearing is had will be granted.

Dated: June 20, 1956.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed June 21, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That the respondent Bruce G. Barber hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order filed herein on June 21, 1956, in favor of the above petitioner.

Dated: August 17, 1956.

LLYOD H. BURKE,
United States Attorney,

By /s/ CHARLES ELMER COLLETT,
Assistant United States Attorney.

[Endorsed]: Filed August 17, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 35435

In the Matter of:

The Petition of Lal Singh, for a Writ of Habeas Corpus.

ORDER ISSUING WRIT OF HABEAS CORPUS AND DISCHARGING PETITIONER

The Court, having heretofore considered the petition for writ of habeas corpus filed herein and the return of the respondent to the order to show cause, and the matter having been heretofore fully presented and heard on said petition and return, and this Court having on June 21, 1956, entered its opinion and order that the writ of habeas corpus issue staying the petitioner's deportation until a new hearing is had on his application for suspension of deportation, in which hearing his eligibility is to be determined under the 1917 Act, now, therefore,

It Is Hereby Ordered that the writ of habeas corpus be and hereby is granted and issued and that the said petitioner be and hereby is discharged from custody of said respondent until such time as said respondent grants the petitioner a new hearing on his application for suspension of deportation in which his eligibility is determined under the Immigration Act of February 5, 1917.

Dated: Sept. 4, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form Sept. 4, 1956.

/s/ CHARLES ELMER COLLETT,
Asst. U. S. Atty.

/s/ MILTON T. SIMMONS,
Attorney for Petitioner.

[Endorsed]: Filed September 4, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That the respondent Bruce G. Barber hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Issuing Writ of Habeas Corpus and Discharging Petitioner, dated and filed on September 4, 1956. in the above-entitled case.

Dated: September 10, 1956.

LLYOD H. BURKE,
United States Attorney,

By /s/ CHARLES ELMER COLLETT,
Assistant United States Attorney.

[Endorsed]: Filed September 11, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.
Petition for Writ of Habeas Corpus.
Order to Show Cause.
Minute Order of Proceedings, May 9, 1956.
Return to Order to Show Cause.
Order Granting New Hearing.
Notice of Appeal.
Order Issuing Writ of Habeas Corpus and Discharging Petitioner.
Notice of Appeal.

Appellant's Designation of Record on Appeal.

Certified Record of Immigration and Naturalization Service, Introduced at Hearing on May 9, 1956.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 26th day of September, 1956.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

EXCERPT FORM DOCKET ENTRIES

1956

May 1—Filed petition for habeas corpus.

May 1—Filed order to show cause, returnable May 9, 1956. (Judge Hamlin.)

May 9—Hearing on order to show cause. Return to defendant filed, memo. of deft. to be filed by May 10, 1956; petitioner 5 days to file reply and case continued to May 16, 1956, for submission. (Judge Hamlin.)

* * *

June 21—Filed return of respondent to order to show cause.

* * *

1956

June 21—Filed order of Court. Petitioner permitted new hearing on application for suspension of deportation and writ of habeas corpus staying deportation until said hearing will be granted. (Judge Hamlin.)

* * *

Aug, 17—Filed notice of appeal by defendant.

* * *

Sept. 4—Filed order issuing writ of habeas corpus and discharging petitioner from custody.

* * *

Sept. 11—Filed notice of appeal by defendant.

Sept. 20—Filed appellant's designation of record on appeal.

[Endorsed]: No. 15300. United States Court of Appeals for the Ninth Circuit. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellant, vs. Lal Singh, Appellee. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed: September 26, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 15300

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco,

Appellant,

vs.

LAL SINGH,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

The appellant, by his undersigned attorneys, presents the following statement of points on which he intends to rely on appeal in this cause:

I.

The District Court erred in holding that no affirmative action is required to bring a person within the savings clause of the Immigration and Naturalization Act of 1952 (Sec. 405(a), 8 U.S.C.A. Sec. 1101, note).

II.

The District Court erred in holding that eligibility for suspension of deportation is a matter within the purview of said savings clause and "which is saved if something relating to the deportation proceeding occurred prior to 1952."

III.

The District Court erred in holding that a warrant of arrest prior to 1952 is sufficient to entitle the deportee to have his eligibility for suspension of deportation determined under the Immigration Act of 1917 (8 U.S.C. 155(c)(2).

IV.

The District Court erred in holding that because the Board of Immigration Appeals "apparently limited its consideration of eligibility to the provisions of the 1952 Act, it would appear that the petitioner is entitled to a new hearing in order that the Board may apply the standards of the 1917 Act in the consideration of his application for suspension of deportation."

V.

The District Court erred in permitting the petitioner a new hearing on his application for suspension of deportation, in which hearing his eligibility is to be determined under said 1917 Act.

VI.

The District Court erred in ordering that a writ of habeas corpus be granted staying the petitioner's deportation until such hearing is had.

VII.

The District Court erred in granting a writ of habeas corpus and discharging the petitioner from custody until such time as the appellant herein grants the petitioner a new hearing on his applica-

tion for suspension of deportation in which his eligibility is to be determined under the said Immigration Act of 1917.

Dated: November 1, 1956.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,

By /s/ CHARLES ELMER COLLETT,
Assistant United States Attorney, Attorneys for the Appellant.

Affidavit of Mail attached.

[Endorsed]: Filed November 1, 1956.